



POLICE DEPARTMENT

February 26, 2019

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In the Matter of the Charges and Specifications :
- against - :
Police Officer Brian Mulkern :
Tax Registry No. 921019 :
20th Precinct :
-----X

Case No.

2017-17436

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: David Green, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Said Police Officer Brian Mulkern, assigned to the 20th Precinct, on or about and between March 1, 2014 and January 18, 2017, while in New York State, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Police Officer Mulkern allowed his residential address to be used as Police Officer Daniel Tabor's mailing address.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT – PROHIBITED
CONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on February 1, 2019. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Sergeant Richard Miller of the Absence Control and Investigations Unit as its witness. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty and recommend a penalty of the loss of 25 vacation days.

ANALYSIS

It is undisputed that as of January 18, 2017, Respondent had lived at [REDACTED] [REDACTED] for approximately ten years. He knows Police Officer Daniel Tabor from having previously worked with him in the 20 Precinct. It is also undisputed that Officer Tabor received mail, including mail from the Department, at Respondent's [REDACTED] [REDACTED] address for a period of time. The issue is whether Respondent allowed Officer Tabor to use his mailing address when Officer Tabor did not actually reside at that address.

Sergeant Richard Miller, assigned to the Absence Control Investigations Unit, testified at trial that he was assigned to investigate a case involving Officer Daniel Tabor¹ who had reported sick and requested to stay in New Jersey. Sergeant Miller found that Officer Tabor listed his official department address as [REDACTED] Sergeant Miller then conducted surveillance at this address on "many dates."² He never observed Officer Tabor's vehicle at the address. On one of his final visits, on December 31, 2016, Sergeant Miller knocked on the door at the address and Respondent answered the door. (Tr. 9-12) Both Sergeant Miller and Respondent identified themselves as members of service and then had a conversation. Sergeant Miller testified that Respondent told him Officer Tabor was his friend from the 20 Precinct. He further testified that when he asked Respondent if Officer Tabor lived at the location, Respondent answered that he did not, though he uses the address for mail. (Tr. 12)

During the course of the investigation, Sergeant Miller also conducted "numerous" observations of Officer Tabor's parents' residence in New Jersey and saw Officer Tabor leaving that residence and reporting to his command. He also tracked Officer Tabor's vehicle through the DAS Lite tracking system. Based on those results and his observations, he concluded that Officer Tabor was living in New Jersey and not living anywhere in New York. (Tr. 13-14)

Both Respondent and Officer Tabor were officially interviewed by the Department in this matter. The transcripts of both interviews were admitted into evidence. (Respondent's interview – Dep't. Ex. 2A and 2B; Officer Tabor's interview – Dep't. Ex. 1A and 1B) Officer Tabor was interviewed on February 8, 2017. He first stated he resides in [REDACTED] but then said that is

¹ The case against Officer Tabor resulted in a negotiated plea where he agreed to forfeit 30 days served on suspension, lose 15 vacation days, be placed on one year dismissal probation, waive all accrued time and leave balance and immediately file for service retirement. Officer Tabor had a previous disciplinary case for failing to reside in New York.

² The Department Advocate did not elicit any specific dates pertaining to the initiation of the investigation, the actions taken, or information obtained, during Sergeant Miller's investigation, except for the date Sergeant Miller encountered Respondent at the address in question and the dates of the official Department interviews of Respondent and Officer Tabor.

where his apartment is, but he has resided with his parents in New Jersey since approximately May 2016, when he hurt his back. He notified the Department he was living in [REDACTED] in late 2013. He filled out a Department 10 card with his residence listed as [REDACTED]. He also registered his car at this address. (Dep't. Ex. 1A, 4-7, 13) Prior to May 2016, Officer Tabor stated that he was at the apartment in [REDACTED] "off and on," slept there a few times a month, and paid a few hundred dollars a month in cash rent. (Dep't. Ex. 1A, 8)

Respondent's Department interview was conducted by Sergeant Miller on January 18, 2017. Respondent stated that he was the only person who lived at [REDACTED] for the last ten years. (Dep't. Ex. 2A, 4) Respondent knows Officer Tabor from working with him in the 20 Precinct and considers him a friend. Respondent was asked if Officer Tabor lived with him and Respondent said he did not. When asked if Officer Tabor ever resided at the [REDACTED] address, Respondent stated, "...soon after he got transferred to the 2-5—he asked me if he could, you know, you know use my place of residence—as a mailing address and everything else." Sergeant Miller next asked, "But not to physically live at that address?" Respondent replied, "I said you could stay there ...and use it if you want, you know, I had no problem with that." Respondent elaborated that he felt bad for Officer Tabor because he heard he got transferred and was "unstable" and needed a helping hand. He added, "I really haven't seen his face... for about a year." The interviewer asked again if Officer Tabor actually stayed at the [REDACTED] address. Respondent replied that he worked opposite shifts from Officer Tabor and he really didn't see him. (Dep't. Ex. 2A, 5-6) He stated that about two years prior he gave Officer Tabor keys, "to pick up his mail." Sergeant Miller pressed Respondent on whether he was saying that Officer Tabor could be staying in the apartment when Respondent wasn't there and Respondent stated that he could have. He added again that he had no problem if he wanted to stay there. Respondent also stated, "I really didn't care ... if he wanted to use it

as a mailing address..." (Dep't. Ex. 2A, 7-8) With regard to Officer Tabor's mail, Respondent stated that Officer Tabor could either come pick it up or Respondent would leave it in Officer Tabor's locker at the 20 Precinct. Respondent acknowledged that Officer Tabor had received mail from the DMV at Respondent's address. (Dep't. Ex. 2A, 8-10) During further questioning, Respondent admitted that if someone was physically sleeping in his house he would know and that there was no evidence that someone had been sleeping in his house at that time. (Dep't. Ex. 2A, 11-12) Respondent acknowledged Officer Tabor was still receiving mail at Respondent's address. (Dep't. Ex. 2A, 9)

Sergeant Miller directly asked Respondent, "Why did you allow him to use your address if he wasn't going to be living there?" Respondent answered, "I felt bad for him..." Sergeant Miller also asked, "...as far as you know he never physically stayed in your house...as his primary place of residence?" Respondent answered, "As far as I know, yeah."

At trial, Respondent testified that Officer Tabor, sometime after March 2014, asked, "if it would be all right if he moved into [his] apartment." He added that he had no problem with that arrangement and Officer Tabor took him up on the offer. (Tr. 26) Respondent testified that Officer Tabor stayed in his apartment for about a year and a half at the most. Since they worked different shifts, he would only see Officer Tabor in the apartment, "on occasion." At some point Respondent had plumbing issues which "destroyed" his apartment, so he told Officer Tabor he had to leave. (Tr. 27-28) Respondent testified that he did not have any knowledge during the time from 2014 until 2017 that Officer Tabor was actually living in New Jersey. He further testified that Officer Tabor never told him he was just using Respondent's residence to gain residency in the boroughs and counties as required by the Department. (Tr. 30)

On cross-examination, Respondent testified that he would see Officer Tabor at his apartment, "maybe every other week." (Tr. 33) He also testified that some of the mail he

received addressed to Officer Tabor at his address was Department mail. (Tr. 31-32) Respondent testified he had no idea how often Officer Tabor actually stayed in his apartment. (Tr. 37)

Under Patrol Guide Section 203-18, Paragraph 1, it is required that all members of the service reside within the City of New York or Westchester, Rockland, Orange, Putnam, Nassau or Suffolk Counties. During the time period charged in the Specification in this case (between March 1, 2014, and January 18, 2017) Respondent lived at [REDACTED] which is in [REDACTED] County. The issue is whether Officer Tabor also resided at that address or whether Respondent, knowing that Officer Tabor did not reside with him, allowed Officer Tabor to falsely use his [REDACTED] address.

The Specification can be divided into separate time periods for purpose of analysis. There is no question that Respondent knew, based on his own statements, that Officer Tabor was not residing with him for at least one year prior to the January 18, 2017, date of Respondent's official Department interview. He also clearly knew that Officer Tabor, during that approximate one year time period, was still receiving mail, including official mail such as mail from the DMV and the Department that was addressed to Officer Tabor at Respondent's address. For this time segment it is clear that Respondent had knowledge that Officer Tabor did not reside with him. He also knew that Officer Tabor was using his address as a mailing address since Officer Tabor was receiving mail at Respondent's address throughout this time period and the mail included Department mail.

For the period of time from March 1, 2014, until approximately January, 2016. Respondent, at trial, has asked the court to believe that he offered Officer Tabor a place to live, that he saw Officer Tabor at the apartment approximately every other week, and that because they had different shifts, Officer Tabor could well have been residing at the apartment. Unfortunately for Respondent, this version of events is not credible.

First of all, I found Sergeant Miller to be a credible witness based on his demeanor and testimony at trial. He testified that at his first encounter with Respondent, Respondent told him that Officer Tabor did not live with him, but just received mail at Respondent's address.

Additionally, Respondent in his Department interview made several statements by which he essentially admitted he allowed Officer Tabor to just use his address without actually residing there. Respondent stated, contrary to his trial testimony that he saw Officer Tabor every other week at the apartment, that he did not see Officer Tabor there. As the interview occurred much closer in time to the time period of the charges, it is more likely than not that if Respondent had in fact seen Officer Tabor at his apartment every other week he would have mentioned that during the official interview and not have said he really didn't see him.

Also, when Sergeant Miller directly asked Respondent, "Why did you allow him to use your address if he wasn't going to be living there?" Respondent didn't contradict Sergeant Miller to say that Officer Tabor was in fact living with him, but instead he just answered that he felt bad for him.

Another indication that Respondent knew he was allowing Officer Tabor to improperly use his address can be seen in how he described Officer Tabor's initial request to him. Respondent gave a much different version of his initial conversation with Officer Tabor at his Department interview than the one he presented at trial. In the official interview, Respondent stated that Officer Tabor asked if he could use his address as "a mailing address and everything else." At trial, Respondent testified that Officer Tabor asked to move in with him and doesn't add anything about a request to use the address. While it is possible that the "everything else" phrase Respondent used in his interview could mean moving in, it seems more likely that Respondent would have said at his interview that Officer Tabor asked to move in. Respondent

wouldn't have started his answer by leading with Officer Tabor's request to use the address as a mailing address without specifically mentioning the request to move in.

Also at the interview, it is quite telling that Respondent said he wouldn't care if Officer Tabor used the address as his mailing address. Respondent's apparent lack of recognition that allowing another officer to simply use his address as a mailing address was improper gives credence to support the charge that he did just that.

Respondent also stated during his interview that if someone was sleeping at his house he would have known it. Based on this statement, Respondent should have been able to state with some degree of certainty how often Officer Tabor stayed at the apartment, instead of testifying that he had no idea.

And finally, when Sergeant Miller at the Department interview directly asked Respondent if as far as Respondent knew Officer Tabor never physically stayed in his house as his primary place of residence, Respondent said as far as he knew that was correct.

In conclusion, it is clear that Respondent is Guilty of Specification 1 for the time period from approximately January 2016 to January 2017, and as it is more likely than not based on the analysis above that Respondent allowed his address to be used as Officer Tabor's mailing address while he was not in fact residing there for the period of time from March 1, 2014, through January 2016, I find Respondent Guilty of Specification 1.

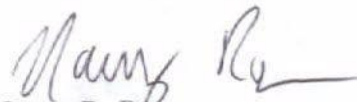
PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on December 17, 1997. Information from his personnel record that was

considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department has requested a penalty of the loss of 25 vacation days. I concur with their recommendation. In a prior case with a similar fact pattern, a four year officer with no disciplinary record forfeited 20 vacation days after a mitigation hearing for allowing Respondent to use his residential address, when they did not in fact reside together (Case No. 2017-17717). In the present case, while Respondent seemingly acted out of a desire to help another officer, that help must not take the form of allowing another officer to violate the Patrol Guide by claiming an address that was not his own. It is also troubling to the court and that Respondent seemingly admitted his misconduct at his official department interview and then changed his story at trial and presented a scenario that was not credible. Therefore, while the facts of the present case are similar to the case cited above, this case calls for a somewhat higher penalty. I recommend that Respondent incur the loss of 25 vacation days.

Respectfully submitted,



Nancy R. Ryan

Assistant Deputy Commissioner Trials

APPROVED

JUN 06 2019

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER BRIAN MULKERN
TAX REGISTRY NO. 921019
DISCIPLINARY CASE NO. 2017-17436

Respondent was appointed to the Department on December 17, 1997. On his last three annual performance evaluations, Respondent received overall ratings of 3.5 "Highly Competent/Competent." He has been awarded one medal for Excellent Police Duty. [REDACTED]

He has no prior disciplinary or monitoring history.

For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner Trials